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In the
Supreme Court of the United States

OCTOBER TERM, 1967

No. 918

W. ABORN SPINNEY,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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No.

W. ABORN SPINNEY,
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v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in the above entitled case on November 16, 1967.

Citations and Opinions Below

The Opinion of the District Court is reported in 264 F.Supp. 774. The Opinion of the Circuit Court of Appeals (Appendix A hereto) is not yet officially reported.

Jurisdiction

The judgment of the Court of Appeals sought to be reviewed (Appendix B hereto) was dated and entered on November 16, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Question Presented

Does the Fifth Amendment to the Constitution of the United States require that agents of the Internal Revenue Service effectively warn a taxpayer of his right to remain silent and of his right against self-incrimination prior to an interrogation of the taxpayer during the course of a criminal tax fraud investigation where at the time of the interrogation the investigation has reached the "accusatory" stage and where during the interrogation the taxpayer's freedom of action is limited "in a significant way."

Constitutional Provisions and Statutes Involved

The Fifth Amendment to the Constitution of the United States provides, in relevant part, that:

> "No person . . . shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty or property without due process of law."

28 U.S.C. § 7201 provides:

> "Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or

the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with costs of prosecution."

26 U.S.C. § 7602 provides:

"For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry."

Statement

On April 15, 1965, Petitioner was indicted for violation of 26 U.S.C. § 7201. The United States District Court for the District of Massachusetts had jurisdiction under the United States Internal Revenue Code. The two count indictment charged that Petitioner willfully and knowingly attempted to evade a large portion of the income tax payable by him and his wife for the years 1959 and 1960 by willfully understating their taxable income for these years. (R. 4, 5) On June 14, 1965, Petitioner pleaded, "Not Guilty", to both counts charged in the indictment. (R. 1) After a trial by jury Petitioner was found guilty on both counts charged in the indictment. (R. 345) Petitioner was sentenced to two months' imprisonment on Count 1 and two months' imprisonment on Count 2, to run concurrently, and was further sentenced to pay a fine of $5,000. (R. 345, 346) Petitioner took an appeal to the Court of Appeals. (R. 346) On November 16, 1967, the Court of Appeals affirmed the judgment of the District Court. (Appendix B hereto)

The investigation of Petitioner, a practicing dentist, sixty three years of age, was begun by the Internal Revenue Service in the year 1960. (R. 133) The investigation ultimately resulted in Petitioner's indictment on April 15, 1965. (R. 4) During the period of the investigation Petitioner was interviewed on various occasions by Revenue Agent Morris E. Rosenberg and later by Special Agent Daniel O'Brien, in company with Agent Rosenberg. (R. 133, 145) During this same period, the Petitioner turned over various books and records to the Internal Revenue Service, (R. 134, 154) and gave permission to the accountant who had prepared his income tax returns for the years 1958 and 1959, to turn over all his records pertaining to the preparation of the returns involved to the Internal Rev-

enue Service if the Internal Revenue Service so requested. (R. 135, 136)

After the investigation by the Internal Revenue Service had been in progress for several years, Petitioner received a letter from the Internal Revenue Service dated March 10, 1964, which advised Petitioner that the investigation by the Intelligence Division of Petitioner's 1958 and 1959 tax returns was nearing completion and that consideration was being given to a possible recommendation of criminal proceedings against Petitioner. The letter further "invited" Petitioner to appear for an "interview" before a decision was made as to whether or not to recommend criminal proceedings against Petitioner. (R. 198) The letter gave Petitioner no warnings as to his Fifth Amendment rights. (R.198)

The letter did not inform the Petitioner that any Internal Revenue personnel would be present, other than Mr. Richard T. Reale, Group Supervisor. The letter did not inform Petitioner that everything he said at the proposed interview would be taken down by a stenographer and could and would be used against him as evidence in a court of law. (R. 198) On April 1, 1964, in response to the letter, Petitioner appeared at the Internal Revenue Office at 55 Tremont Street, Boston, Massachusetts. (R. 332) At the commencement of the "interview", Petitioner was asked by the interrogator if he was aware of his rights under the Fifth Amendment, that he could not be compelled to testify against himself. To this question Petitioner replied, "*No.*" (R. 333) After being informed that Petitioner did not understand his rights under the Fifth Amendment, Mr. Reale proceeded to interrogate Petitioner extensively, without further mention of Petitioner's Fifth Amendment rights. Revenue Agent Morris E. Rosenberg and Special Agent Daniel O'Brien were present during this interrogation. (R. 133-144)

Prior to trial on September 21, 1966, Petitioner filed a motion to suppress the stenographic transcript of this "interview" and to suppress all records and papers turned over to the Internal Revenue Service by Petitioner at the time of the "interview". (Appendix C hereto) On October 24, 1966, at a pre-trial hearing on this motion to suppress, Petitioner orally stated to the Court that if the transcript of the "interview" were suppressed, Petitioner would further move to suppress all other fruits of the "interview". (R. 8) After hearing, Petitioner's motion to suppress was denied. (R. 349-353) Over Petitioner's objection, statements made by Petitioner to the Internal Revenue Service during this "interview" were read to the jury at the trial in the District Court. (R. 204-214)

Reasons For Granting the Writ

Conflict presently exists between the decisions of several District Courts as to whether the Decisions of this Court in *Escobedo* v. *Illinois,* 378 U.S. 478 (1964) and *Miranda* v. *Arizona,* 384 U.S. 436 (1966) require that agents of the Internal Revenue Service warn a taxpayer of his Fifth Amendment right to remain silent and right against self-incrimination prior to an interrogation of the taxpayer during an investigation by the Internal Revenue Service into possible criminal conduct of the taxpayer. Several District Court decisions have held that this Court's decision in *Miranda* applies to require that a taxpayer be advised of his Fifth Amendment rights prior to an interrogation by agents of the Internal Revenue Service during the course of a criminal tax fraud investigation. *United States* v. *Schoenburg,* 67-1 USTC ¶ 9393, (D. Ariz. 1965); *United States* v. *Kingry,* 19 AFTR 762 (N.D. Fla. 1967); and *United States* v. *Turzinski,* 67-2 USTC ¶ 9489

(N.D. Ill. 1967). In *Turzinski,* a case similar to the instant case on its facts, the Court applied the following rationale:

> "While criminal tax investigations by their nature are almost always devoid of anything that smacks of custody, the administrative procedure of the Internal Revenue Service offers at least one equally tangible point at which the adversary process can be said to have begun. The formal, internal shift from Internal Revenue Agents to Special Agents of the Intelligence Division converts the investigation from civil to criminal. At this point the taxpayer is under suspicion of tax fraud, the investigatory power of the government is directed against him with the intent of developing evidence to convict him, and his need to know his rights is quite as real and urgent as that of the suspect under custodial interrogation."

Few Circuit Courts have flatly stated that *Miranda* and *Escobedo* warnings do not, on any set of facts, apply to interrogations incident to criminal tax fraud investigations. For example, in *Maius* v. *United States,* 67-2 USTC ¶ 9521, F2 (6th Cir. 1967) cert. den. 36 USLW 3161 (Oct. 17, 1967) (No. 372), the Court of Appeals for the Sixth Circuit, while refusing to apply *Escobedo* and *Miranda* warnings to a criminal tax fraud case, said:

> "It would seem, in all fairness, that before he answers such questions and thereby directly incriminates himself, he should be advised of his right to have his lawyer present . . . . Until we are told by superior authority that a citizen's constitutional rights are imperilled by such procedure, we are constrained to hold that the evidence hereby obtained is admis-

sible in the ensuing criminal trial." See also *U. S.* v. *Carlson,* 260 F.Supp. 423, 427 (E.D.N.Y.)

Mr. Justice Douglas was of the opinion that certiorari should be granted in *Maius.* Mr. Justice Marshall took no part in the decision on the Petition for a Writ of Certiorari in *Maius.* See similarly, *Selinger* v. *Bigler,* 67-1 USTC ¶ 9420, F2 (9th Cir. 1967), cert. den. 36 U.S.L.W. 3161, (Oct. 17, 1967), (No. 313); and *Schlinsky* v. *United States,* 67-2 USTC ¶ 9493, F2 , (1st Cir. 1967), cert. den. 36 U.S.L.W. 3173, (Oct. 24, 1967) (No. 436).

The Circuit Court decisions which have held *Miranda* and *Escobedo* warnings inapplicable to an interrogation of a taxpayer incident to a criminal tax fraud investigation have rested on many varied grounds. Some Circuit Court decisions suggest that warnings as to Fifth Amendment rights are required only if the defendant's freedom of action is restricted by physical custody or by actual arrest. *Morgan* v. *United States,* 377 F2 507 (1st Cir. 1955); *Schlinsky* v. *United States,* supra. Other cases, including *Kohatsu* v. *United States;* 351 F2 898 (1964), cert. den., 384 U.S. 1011, have reasoned that *Miranda* warnings are required only where the criminal tax fraud investigation has reached the "accusatory" stage. Whether the particular decision has followed the "accusatory" language of *Escobedo* or the "in custody" language of *Miranda,* there has been vast confusion in all cases as to what constitutes "custody" and what constitutes the "accusatory stage" of a criminal tax fraud investigation. Petitioner contends that on a proper set of facts, the Fifth Amendment requires that agents of the Internal Revenue give *Miranda* warnings prior to any interrogation of a taxpayer during the course of a criminal tax fraud investigation. Given the conflict in the District Court

decisions and the confusion in the rationale of the opinions of the various Circuit Courts below, it is vital to the effective preservation of the Fifth Amendment rights of taxpayers that this Court state what constitutes such a proper set of facts.

Petitioner contends that the facts of the instant case are proper for such a clarifying statement. At the time of the "interview" of Petitioner on April 1, 1964, at the office of the Internal Revenue Service in Boston, the investigation of Petitioner's tax returns by the Intelligence Division of the Internal Revenue Service for the tax years, 1958 and 1959, had been in progress for almost four years. (R. 133) On April 15, 1965, a little more than a year subsequent to the date of the "interview", Petitioner was in fact indicted for violation of 27 U.S.C. § 7201. Immediately prior to the interview, Petitioner received the following letter from the Internal Revenue Service:

> "Investigation by the Intelligence Division of your personal income tax liability for the years 1958 and 1959 is nearing completion.
>
> 'Consideration is being given to a possible recommendation criminal proceedings be instituted against you.
>
> 'Before a decision is made, you are invited to appear, with counsel, if you so desire, or with any other person having knowledge of the facts for a formal interview to be held at 10:00 A.M. on March 19, 1964 in Room 947, 55 Tremont Street, Boston, Massachusetts.
>
> 'Richard T. Reale, Group Supervisor, will conduct the interview, at which time you may present facts or evidence you wish to have considered.

'You are requested to inform this office promptly whether it is your intention to appear for the proposed interview.

'It is important your reply or any inquiry be addressed to the District Director of Internal Revenue, Attention: Acting Chief, Intelligence Division, Post Office Box 202, Boston, Massachusetts 02101.

Very truly yours,
Harold L. Smith
Acting Chief
Intelligence Division''
(R. 332)

This letter "inviting" Petitioner to appear for this "interview" stated in clear terms that the investigation of Petitioner's 1958 and 1959 tax returns had progressed to a stage where a "decision" was about to be made by the Internal Revenue Service on whether to seek a criminal indictment of Petitioner for violation of 26 U.S.C. § 7201. It is apparent from the language of this letter, taken by itself, that the investigation of Petitioner's 1958 and 1959 tax returns had, by the time of this letter, passed from the "investigatory" to the "accusatory" stage. At the time of the interview, Petitioner was consequently entitled to Fifth Amendment warnings despite the fact that Petitioner was not yet formally under indictment. In *Escobedo*, this Court said, at p. 485:

"The interrogation here was conducted before petitioner was formally indicted. But in this context of the case, that fact should make no difference. When petitioner requested and was denied an opportunity to consult with his lawyer, the investigation had ceased to be a general investigation of "an unsolved

> crime. . . . Petitioner had become the accused, and the purpose of the interrogation was to get him to confess his guilt despite his constitutional right not to do so."

Here, as in *Escobedo,* the criminal investigation by the Internal Revenue Service (at the time of the "interview") had progressed to a stage where if Petitioner were not immediately advised of his Fifth Amendment rights, Petitioner's Fifth Amendment rights would thereafter be of little avail to him. If it were not apparent from the letter considered by itself that the investigation of Petitioner had reached the "accusatory" stage by the time of the "interview", this fact is conclusively established by the transcript of the "interview" itself. (R. 333, 344) At the middle of the interview", following several incriminating statements by Petitioner, (R. 333, 338) the interrogating agent flatly revealed to Petitioner that the investigation had uncovered evidence sufficient to warrant consideration of a possible indictment of Petitioner:

> "Doctor, the investigation has established that with respect to the year 1958, you reported net profit from your profession, of $6,659.99, that you should have reported $15,650.98, and that therefore your reported income was understated by $8,990.89. As to the year 1959, the investigation disclosed that you have a net profit from your profession of $17,885.21, that you reported $6,899.43, and that the understatement of income was $10,985.78 Is there any explanation, Doctor, that you might have for those differences?"

Petitioner, here, recognizes that the Fifth Amendment warnings required by *Miranda* apply to "in custody" interrogations. This Court, in *Miranda*, said:

> "By custodial interrogation we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."

In a footnote the Court added:

> "This is what we meant in Escobedo when we spoke of an investigation which had focused on the accused."

It is apparent that in adding the phrase, ". . . or otherwise deprived of his freedom of action in any significant way", this Court contemplated interrogations involving deprivation of Fifth Amendment rights in coercive interrogations not necessarily involving strict physical detention or actual arrest. Several courts below have adopted this interpretation. *Schoenburg,* supra; *Kingry,* supra, 762; *United States* v. *Gower,* 65-2 USTC § 15.655 (Md. Pa., 1965) (dicta). See also, *United States* v. *Harrison,* 67-1 USTC § 9222 (S.D. N.Y. 1967).

Petitioner contends that his "interview" with the Internal Revenue Service on April 4, 1964, constituted an "in custody" interrogation within the meaning of *Escobedo* and *Miranda* where during the "interview" Petitioner was deprived of his freedom of action "in a significant way." The letter dated March 10, 1964, considered by itself, severely limited Petitioner's freedom of action prior to the "interview." 26 U.S.C. § 7602 authorizes the Secretary or his delegates to summon persons and records during the course of a civil tax investigation. The letter which Petitioner received from the Internal Revenue Service "inviting" Petitioner's attendance at this "interview", might logically have been understood by Petitioner to constitute a summons under 26 U.S.C. § 7602 ordering Petitioner under penalty of contempt to produce the "re-

quested'' records and to appear and to give the ''requested'' testimony. The danger that the letter would be so construed as an *order* to appear was increased by the fact that the letter nowhere informed Petitioner that he had a constitutional right to refuse to attend the ''interview'', a right to remain silent and not to incriminate himself. Further, in one breath the letter ''invited'' Petitioner to attend the interview; in the next breath the letter informed Petitioner that (whether Petitioner attends the interview or not), a ''decision'' would shortly be made on whether to seek a criminal indictment of Petitioner for tax evasion. The logical inference drawn by a layman from the language used in the letter is that a criminal indictment would follow Petitioner's failure to appear for the ''interview''. The language of the letter read in the light of 26 U.S.C. § 7602 compelled Petitioner's attendance at this ''interview''. Compounding the compulsion of the letter itself is the fact that the ''interview'' took place not at Petitioner's residence or place of business, thus distinguishing Petitioner's case from *Schlinsky*, supra; *Kohatsu*, supra, 898; and other cases, but at an office of the Internal Revenue Service in Boston—in an atmosphere calculated to discourage Petitioner from opposing his own will to the will of the government. Finally, the ''interview'' was conducted not by one Internal Revenue Service official, as suggested by the letter of March 10, 1964, but by two Internal Revenue Service agents, in the presence of a third agent. (R. 333)

The language of the letter of March 10, 1964, referring to a possible criminal prosecution of Petitioner; the power of summons conferred on the Internal Revenue Service by Congress under 26 U.S.C. § 7602; the place of the ''interview'' in an office of the Internal Revenue Service; and the presence of three Internal Revenue Service agents at the ''interview'' itself, were all factors operating to

create a coercive custodial atmosphere which inevitably deprived Petitioner of his freedom of action "in a significant way." Considering these factors, the rationale of the decision of the Court of Appeals that Petitioner voluntarily attended the "interview" and voluntarily answered questions was unrealistic. The Court of Appeals said:

> "Clearly, however, this defendant was not deprived of his freedom of action at all. He was not compelled to appear at the interview or answer questions. He did both voluntarily." (p. 21 Appendix A hereto)

This Court, in *Miranda,* was concerned with the coercive character of the interrogation and with the practical limitations which this coercion in fact placed on the individual's freedom of action, and not with the technical question of whether the individual being interrogated was technically free to leave the place of the interrogation, in a physical sense. Given the legal and psychological pressures applied to this Petitioner immediately prior to and during the "interview", this Petitioner was no freer to ignore and to walk away from this interrogation than was the Petitioner in *Miranda* who, as a matter of fact, was physically detained. The Fifth Amendment, as construed by this Court in both *Escobedo* and *Miranda,* required that this Petitioner be warned of his Fifth Amendment rights prior to this "accusatorial" and "custodial" interrogation, despite the fact that Petitioner was not at the time of the "interview" physically detained or under actual arrest.

The record here indicates not merely that the Internal Revenue Service agents did not, in fact, advise Petitioner of his Fifth Amendment rights prior to the "interview", but that the agents proceeded to interrogate Petitioner

after being expressly informed by Petitioner that he was ignorant of his Fifth Amendment rights:

"1. Mr. Reale: Doctor Spinney, you recently received a letter inviting you to come here today, if you so chose, for a Formal Interview. Is that right?
Dr. Spinney: Yes.

2. Q. Doctor Spinney, the purpose of this interview, if there is to be one, is to afford you the opportunity to offer any explanation, or submit any evidence you might choose to submit. You should understand if you do make any statements, or submit any evidence, these statements must be made under oath, and you should be cognizant of your constitutional guarantee against self-incrimination. Is that perfectly clear to you, Doctor?
A. I think so.

3. Q. Are you aware of your rights under the Fifth Amendment, that you cannot be compelled to testify against yourself?
A. No, but that doesn't interest me. I don't know why it should. Go ahead. If you should bring up a problem I will let you know. As far as I am concerned, I am ready to listen and see what happens." (R. 333)

After thus being informed of Petitioner's ignorance of his right to remain silent and his right not to incriminate himself, the Internal Revenue agents, without making any further statement to Petitioner as to the nature of his constitutional rights, conducted an extensive interrogation of Petitioner. Given this procedure, Petitioner was not accorded his rights under the Fifth Amendment as construed by this Court in *Escobedo* and *Miranda*, and all

consequent statements made by Petitioner during the "interview" should have been suppressed in accordance with Petitioner's Motion to Suppress filed in the court below. (Appendix C hereto)

Conclusion

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Appendix A

United States Court of Appeals
For the First Circuit

No. 6910.

W. ABORN SPINNEY,
DEFENDANT, APPELLANT,
v.
UNITED STATES OF AMERICA,
APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before ALDRICH, *Chief Judge*,
McENTEE and COFFIN, *Circuit Judges*.

Daniel B. Bickford, with whom *John F. Kehoe* and *Ely, Bartlett, Brown & Proctor* were on brief, for appellant.
John M. Callahan, Assistant U. S. Attorney, with whom *Paul F. Markham*, United States Attorney, was on brief, for appellee.

November 16, 1967.

McENTEE, *Circuit Judge*. Defendant, Dr. Spinney, a practicing dentist, appeals his conviction by a jury on a two count indictment charging him with income tax evasion[1] for the years 1958 and 1959.[2] He admits that he under-

[1] 26 U.S.C. § 7201. *Attempt to evade or defeat tax*
"Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution."

[2] Both counts charged the defendant with willfully and knowingly attempting to evade and defeat a large part of his and his wife's income liability by filing false and fraudulent joint tax returns for the years

stated his taxable income for the years in question but contends that the government's proof of willfullness was not sufficient to sustain a conviction. He also contends that prior to and during trial his constitutional rights were violated. We shall consider this latter contention first.

For several years prior to indictment the Internal Revenue Service (I.R.S.) investigated defendant's income tax liability for the years in question, interviewed him at home as early as December 1960 and in March 1964 wrote a letter inviting him to appear for a formal interview.[3]

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in question. Count 1 charges that the reported taxable income of the defendant and his wife for 1958 was $1,443.82 and their reported tax liability $430.51, whereas the correct taxable income was $16,923.09 and the tax $4,375.60. Count 2 alleges that their reported taxable income for 1959 was $1,412.54 and their reported tax liability $462.51, whereas the correct taxable income for that year was $10,160.24, with a tax liability of $2,421.66.

[3] The I.R.S. letter to the defendant, dated March 10, 1964, reads as follows:

"Dr. W. Aborn Spinney
277 Woburn Street,
Reading, Massachusetts

Dear Sir:

Investigation by the Intelligence Division of your personal income tax liability for the years 1958 and 1959 is nearing completion.

Consideration is being given to a possible recommendation criminal proceedings be instituted against you.

Before a decision is made, you are invited to appear, with counsel, if you so desire, or with any other person having knowledge of the facts for a formal interview to be held at 10:00 A.M. on March 19, 1964 in Room 947, 55 Tremont Street, Boston, Massachusetts.

Richard T. Reale, Group Supervisor, will conduct the interview, at which time you may present facts or evidence you wish to have considered.

You are requested to inform this office promptly whether it is your intention to appear for the proposed interview. It is important your reply or any inquiry be addressed to the District Director of Internal Revenue, Attention: Acting Chief, Intelligence Division, Post Office Box 202, Boston, Massachusetts 02101.

Very truly yours,

HAROLD L. SMITH
Acting Chief, Intelligence Division"

In response to this letter defendant went to the I.R.S. office in Boston on April 1, 1964, and was interviewed. A stenographic transcript was made, the relevant portions of which are as follows:

"1. Mr. Reale: Doctor Spinney, you recently received a letter inviting you to come here today, if you so chose, for a Formal Interview. Is that right?

Dr. Spinney: Yes.

2. Q. Doctor Spinney, the purpose of this interview, if there is to be one, is to afford you the opportunity to offer any explanations, or submit any evidence you might choose to submit. You should understand if you do make any statements, or submit any evidence, these statements must be made under oath, and you should be cognizant of your constitutional guarantee against self-incrimination. Is that perfectly clear to you, Doctor?

A. I think so.

3. Q. Are you aware of your rights under the Fifth Amendment, that you cannot be compelled to testify against yourself?

A. No, but that doesn't interest me. I don't know why it should. Go ahead. If you should bring up a problem I will let you know. As far as I'm concerned, I am ready to listen and see what happens.

4. Q. Doctor, the subject matter is your Income Tax Liability for the years 1958 and 1959. Now do you wish to be heard?

A. Do I wish to be what?

5. Q. Do you wish to be heard, or to make an explanation with regard to your 1958 and 1959 In-

come Tax Returns, and the liability that was shown thereon as you filed them?

A. Yes. Certainly.

6. Q. Do you want to stand and be sworn? Doctor Spinney, do you solemnly swear that your testimony here today will be the truth, the whole truth and nothing but the truth, so help you God?

A. Yes."

Prior to trial defendant moved to suppress the transcript of the interview and the evidence obtained by the I.R.S. as a result of it.[4] This motion was denied. *United States* v. *Spinney,* 264 F.Supp. 774 (D.Mass. 1966). At the trial the transcript of the interview was admitted in evidence. On appeal, defendant contends that the trial court erred in denying his motion to suppress and that the admission in evidence of the transcript as well as the fruits of the April 1 interrogation violated his Fifth Amendment rights. Specifically he complains that in neither the letter nor the interview was he given the required warnings enunciated in *Miranda* v. *Arizona,* 384 U.S. 436 (1966), that he had a right to remain silent at the proposed interview and also that anything he said could be used as evidence against him.

Miranda involved a custodial interrogation. To be sure,

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[4] This included:

All records and copies of records obtained from the defendant including, but not limited to:

a. Daily sheets and copies of daily sheets relating to the defendant's dental practice;

b. Check books and copies of check books dealing with the defendant's bank accounts at the Middlesex County National Bank, Winchester National Bank and the Meredith Trust Company;

c. Invoices obtained from the defendant relating to expenses;

d. Any other records obtained from the defendant or his agents without informing the defendant of his Constitutional rights and more particularly, his right not to incriminate himself.

the Court said in that case that custodial interrogation means "questioning initiated by law enforcement officers after a person has been taken into custody *or otherwise deprived of his freedom of action in any significant way.*" *Miranda, supra* at 444. (emphasis supplied) Clearly, however, this defendant was not deprived of his freedom of action at all. He was not compelled to appear at the interview or answer questions. He did both voluntarily. In this circuit we have recently held that whatever the limits of *Miranda,* it does not extend to a factual situation such as is presented here. *Morgan* v. *United States,* 377 F.2d 507 (1st Cir. 1967). Although in *Morgan* defendant complained that he was not warned of his right to counsel, our holding in that case is not based on such a narrow factual distinction. *Morgan* stands for the proposition that where one is legally free, albeit at the risk of unpleasant consequences, to reject the government's invitation to appear and participate in an I.R.S. interview, the requirements enumerated in *Miranda* do not apply. We think the observations we made at 508 in *Morgan* apply with equal force here.

> "... the background of *Miranda* demonstrates that it was the product of the Court's concern with the difficulty of protecting persons in the custody of the police from coercive interrogation tactics carried on in secret. See Developments in the Law—Confessions, 79 Harv. L. Rev. 935, 954-1022 (1966). That, of course, is not this case. Defendant makes no assertion, nor could he, that he was not free to walk out of the Internal Revenue office at any time. Nor is there any suggestion of trickery or fraud.
>
> "There must be reasonable limits to the solicitude required of the government...."

Therefore, we find no merit in this contention.[5]

Nor are we impressed by defendant's claim that there was not sufficient evidence of willfullness to withstand his motion for judgment of acquittal. It is uncontested that there was an understatement of gross receipts. As above stated, it is only the question of willfullness that defendant contests. In support of this contention he cites his cooperation with the I.R.S. investigation to show his lack of intention to defraud. Even if true, this can hardly be considered proof of his innocence. Otherwise, anyone accused of this crime could assure his acquittal by cooperating with the investigating authorities regardless of what the investigation might uncover.

"Wilfulness is, of course, a question of fact. But direct proof thereof is not essential. It may be inferred from acts and circumstances, and the inference may be drawn from a combination of acts and circumstances, although each separate act and circumstance standing alone is inconclusive." *Gaunt* v. *United States*, 184 F.2d 284, 290 (1st Cir. 1950), *cert. denied*, 340 U.S. 917 (1951). The real question here is whether there is sufficient evidence from which the jury could reasonably infer defendant's willfullness. We think that there is. There is evidence that defendant understated his gross receipts on his 1958 tax return by $11,248 and on his 1959 return by $3,173.38.[6] His accountant, one Lewis, testified that he obtained the figures on Dr. Spinney's gross receipts for the two years in question from monthly totals furnished by Dr. Spinney

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[5] Defendant in his brief relies on the recent case of *United States* v. *Kingry*, 19 Am. Fed. Tax R. 2d 762 (N.D.Fla. 1967).. We call attention to the fact that in *Morgan* at 508 we expressly declined to follow that case. *See also*, *United States* v. *Maius*, 378 F.2d 716 (6th Cir. 1967), *cert. denied* 10/17/67.

[6]

	Reported gross	*Actual gross*
1958	$29,326.00	$40,574.00
1959	$32,838.00	$36,011.38

himself.[7] Lewis further stated that he merely added these monthly totals but did not check their accuracy from the daily sheets. These sheets which were examined by the I.R.S. support the understatements of gross receipts as defendant subsequently admitted. The jury was entitled to consider the unlikelihood of a man who had shown a keen interest in knowing whether his practice was increasing being unaware of his gross income during these years.

In addition, it was shown that defendant substantially overstated his deductions for dentures, dental supplies and other professional expenses.[8] There is evidence that he paid these bills himself, that he did this by check and that the only information the accountant had on these expenses was what he obtained from the defendant.[9]

Defendant's entertainment deductions of $722 taken in 1958 and $825 in 1959, although relatively small, are nevertheless of particular significance on the issue of intent. I.R.S. agent Rosenberg testified that when he asked Dr. Spinney if he could explain and substantiate these deductions, he replied "No. Everyone else takes them. So can I." In this connection defendant's accountant testified that in discussing entertainment expenses for the years in question, he told defendant that certain of these expenses were deductible but warned that they would have to be substantiated in case of inquiry.

From all of the above stated evidence, we think the jury could reasonably infer that this defendant knowingly and

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[7] He said that Dr. Spinney placed the daily sheets showing payments by patients in monthly groupings with the total for the month written on a piece of white paper placed on the top of each stack.

[8]

	Claimed expenses	*Actual expenses*
1958	$6,829.96	$3,076.39
1959	$7,486.92	$3,513.41

[9] Lewis testified that Dr. Spinney sat at a table reading figures from his check stubs and informed Lewis of the purpose of the checks, all of which information Lewis wrote down.

willfully understated his gross receipts and overstated his deductions in an attempt to evade his income tax liability for the years 1958 and 1959.[10]

Affirmed.

[10] Defendant also raises the point that the trial judge erred in refusing to give three requested instructions with reference to deductible expenditures not reflected on his returns. The only such item involved is fees allegedly paid to his accountant. The accountant testified that he received nothing for preparing the 1958 and 1959 returns and Dr. Spinney's own records do not reflect any such payment, but he claims payments to his accountant of $150 a year during these years. Even if true, a deduction of such a small amount would have no substantial effect on defendant's taxable income and could not affect the outcome of the case. Therefore he was not entitled to such an instruction. *United States* v. *Bender*, 218 F.2d 869 (7th Cir.), *cert. denied*, 349 U.S. 920 (1955); *cf. Small* v. *United States*, 255 F.2d 604 (1st Cir. 1958).

Appendix B

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On the same day, November 16, 1967, the following judgment was entered:

JUDGMENT

November 16, 1967

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:
ROGER A. STINCHFIELD, *Clerk.*
By: (s) DANA H. GALLUP
Chief Deputy Clerk.

Enter:
(s) ALDRICH, Ch.J.

Thereafter, on November 22, 1967, mandate herein was stayed.

Appendix C

MOTION TO SUPPRESS EVIDENCE

The defendant, W. Aborn Spinney, by his counsel, respectfully moves this Court to suppress the following evidence obtained as a result of interrogation of the defendant:

1. A statement dated April 1, 1964;
2. All records and copies of records obtained from the defendant including, but not limited to:
   a. Daily sheets and copies of daily sheets relating to the defendant's dental practice;
   b. Check books and copies of check books dealing with the defendant's bank accounts at the Middlesex County National Bank, Winchester National Bank and the Meredith Trust Company;
   c. Invoices obtained from the defendant relating to expenses;
   d. Any other records obtained from the defendant or his agents without informing the defendant of his Constitutional rights and more particularly, his right not to incriminate himself.

As grounds for the motion, the defendant states:

1. That the defendant was questioned and documents were obtained in violation of the Fifth Amendment to the Constitution of the United States;
2. That the interrogation of the defendant was, therefore, illegal, and all fruits of the interrogation must be suppressed;
3. All statements either written or oral, and all documents obtained in violation of the defendant's rights under the Fifth Amendment to the Constitution of the United States were illegally obtained and must be suppressed;
4. And for such further relief and reasons as may appear upon oral hearing of this motion.

Respectfully submitted,
DANIEL B. BICKFORD, ESQ.
ELY, BARTLETT, BROWN & PROCTOR

Appendix D

OPINION

December 20, 1966

JULIAN, D. J.

This case came on to be heard on the defendant's Motion to Suppress Evidence. Both the Government and the defendant agreed to submit the motion for the Court's decision on the basis of the memoranda and exhibits filed.

I make the following findings of fact and conclusions of law. The Acting Chief of the Intelligence Division of the Internal Revenue Service (IRS) sent a letter to the defendant dated March 10, 1964, which read as follows:

> "Investigation by the Intelligence Division of your personal income tax liability for the years 1958 and 1959 is nearing completion.
>
> "Consideration is being given to a possible recommendation criminal proceedings be instituted against you.
>
> "Before a decision is made, you are invited to appear, with counsel, if you so desire, or with any other person having knowledge of the facts for a formal interview to be held at 10:00 A.M. on March 19, 1964 in Room 947, 55 Tremont Street, Boston, Massachusetts.
>
> "Richard T. Reale, Group Supervisor, will conduct the interview, at which time you may present facts or evidence you wish to have considered.
>
> "You are requested to inform this office promptly whether it is your intention to appear for the proposed interview.
>
> "It is important your reply or any inquiry be addressed to the District Director of Internal Revenue,

Attention: Acting Chief, Intelligence Division, Post Office Box 202, Boston, Massachusetts 02101.

"Very truly yours,

"HAROLD L. SMITH

Acting Chief

Intelligence Division"

In response to this letter the defendant appeared at the IRS office in Boston, Massachusetts, on April 1, 1964. The defendant was interviewed, and a transcript of the interview was taken. I shall quote the portions of that interview that are relevant to the present issue:

"1. Mr. Reale: Doctor Spinney, you recently received a letter inviting you to come here today, if you so choose, for a Formal Interview. Is that right?

Dr. Spinney: Yes.

"2. Q. Doctor Spinney, the purpose of this interview, if there is to be one, is to afford you the opportunity to offer any explanations, or submit any evidence you might choose to submit. You should understand if you do make any statements, or submit any evidence, these statements must be made under oath, and you should be cognizant of your constitutional guarantee against self-incrimination. Is that perfectly clear to you, Doctor?

A. I think so.

"3. Q. Are you aware of your rights under the Fifth Amendment, that you cannot be compelled to testify against yourself?

A. No, but that doesn't interest me. I don't know why it should. Go ahead. If you should bring up a problem I will let you know. As far as I'm concerned I am ready to listen and see what happens.

"4. Q. Doctor, the subject matter is your Income Tax Liability for the years 1958 and 1959. Now do you wish to be heard?

A. Do I wish to what?

"5. Q. Do you wish to be heard, or to make an explanation with regard to your 1958 and 1959 Income Tax Returns, and the liability that was shown thereon as you filed them?

A. Yes. Certainly.

"6. Q. Do you want to stand and be sworn? Doctor Spinney, do you solemnly swear that your testimony here today will be the truth, the whole truth and nothing but the truth, so help you God?

A. Yes."

The defendant seeks to suppress as evidence the statements of the defendant which followed this portion of the interview, and any records obtained by the Government as fruits thereof. The defendant contends that in the circumstances of this interview, the IRS agents were required to inform the defendant of his constitutional right of consultation with a lawyer and privilege against self-incrimination. The defendant relies upon the Supreme Court decisions in *Escobedo* v. *Illinois*, 1964, 378 U.S. 478, and *Miranda* v. *Arizona*, 1966, 384 U.S. 436.

I find that the rules for the conduct of an interrogation specified in the *Escobedo* and *Miranda* decisions are not applicable to the facts of this case. Both decisions explicitly deal with in-custody interrogation. In the *Escobedo* case, the Court held that a statement elicited by the police during interrogation shall not be admitted in a criminal trial against the person interrogated when

"... the investigation is no longer a general inquiry into an unresolved crime but has begun to focus on a particular suspect, *the suspect has been taken into police custody*, the police carry out a process of interrogation that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer and the

police have not effectively warned him of his absolute constitutional right to remain silent. (Emphasis added.) Supra at 490-91.

Similarly, the Court in *Miranda* stated that, "More specifically, we deal with the admissibility of statements obtained from an individual who is subjected to custodial police interrogation." The Court defines "custodial interrogation" to mean

> "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom in any significant way."

I find that in the present case the defendant was neither in custody nor deprived of his freedom in any significant way at the time of the interview. The defendant came to the interview in response to a letter which "invited" him to appear. The fact that he was free to decline the "invitation" is indicated by the statement in the letter, "You are requested to inform this office promptly whether it is your intention to appear for the proposed interview." After the defendant had appeared at the office of the Intelligence Division of the IRS, he was again reminded that the choice was his as to whether or not there would be an interview."* This situation has none of the characteristics of a custodial interrogation, and therefore the requirements enumerated in the *Miranda* and *Escobedo* cases are not applicable.

Accordingly, the defendant's Motion to Suppress Evidence is denied.

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* See the portion of the transcript of the interview quoted supra.

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 918

W. ABORN SPINNEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner, a dentist, was charged in a two-count indictment with income-tax evasion for 1958 and 1959, in violation of Section 7201 of the Internal Revenue Code of 1954 (R. 4–5). The government's proof showed that petitioner and his wife had taxable income of $17,167.39 in 1958 and $9,384.43 in 1959, as compared with reported taxable income for the respective years of $1,443.82 and $1,412.54 (R. 250–253).

Petitioner was convicted on each count after a jury trial. He was sentenced to two concurrent prison terms of two months and was fined a total of $5,000 (R. 345).

286-846—68

There is no merit to the sole contention made in the petition—that the trial court erred in denying a motion, based on *Miranda* v. *Arizona*, 384 U.S. 436, to suppress certain statements made by petitioner in the course of a formal interview in the Boston office of the Internal Revenue Service in April 1964.

To begin with, petitioner was advised of his right to counsel and his privilege against self-incrimination. The letter inviting him to appear for the interview informed him that a criminal prosecution was being considered, and stated that he could appear with counsel if he so desired (Pet. 9; R. 332). At the very beginning of the interview the following exchange took place (Pet. 15):

> 1. Mr. REALE. Doctor Spinney, you recently received a letter inviting you to come here today, if you so chose, for a Formal Interview. Is that right?
>
> Dr. SPINNEY. Yes.
>
> 2. Q. Doctor Spinney, the purpose of this interview, if there is to be one, is to afford you the opportunity to offer any explanation, or submit any evidence you might choose to submit. You should understand if you do make any statements, or submit any evidence, these statements must be made under oath, and you should be cognizant of your constitutional guarantee against self-incrimination. Is that perfectly clear to you, Doctor?

A. I think so.

3. Q. Are you aware of your rights under the Fifth Amendment, that you cannot be compelled to testify against yourself?

A. No, but that doesn't interest me. I don't know why it should. Go ahead. If you should bring up a problem I will let you know. As far as I am concerned, I am ready to listen and see what happens.

Assuming, *arguendo*, that petitioner was not warned of his rights in the manner required by *Miranda*, it is clear that he was not in custody or deprived of his freedom in any way, and therefore was not subject to the kind of compulsion that the rules of *Miranda* were designed to prevent. The courts of appeals in five other circuits agree that the *Miranda* warning is not required in such a case. *Thomas* v. *United States*, 370 F. 2d 96 (C.A. 5), certiorari denied, 386 U.S. 975;[1] *United States* v. *Maius*, 378 F. 2d 716, 718–719 (C.A. 6), certiorari denied, October 16, 1967, No. 372, this Term; *United States* v. *Mansfield*, 381 F. 2d 961 (C.A. 7th), certiorari denied, December 18, 1967, No. 723, this Term; *Frohmann* v. *United States*, decided July 27, 1967, 20 A.F.T.R. 2d 5244 (C.A. 8), certiorari

[1] Although this issue is not discussed in the Fifth Circuit's *per curiam* opinion, it is evident from Mr. Justice Douglas' dissent from the denial of certiorari in *Thomas* that the question was raised in the case. Cf. *Evans* v. *United States*, 377 F. 2d 535 (C.A. 5).

denied, December 4, 1967, No. 644, this Term; *Kohatsu* v. *United States*, 351 F. 2d 898 (C.A. 9), certiorari denied, 384 U.S. 1011.[2]

Respectfully submitted,

ERWIN N. GRISWOLD,
Solicitor General.
MITCHELL ROGOVIN,
Assistant Attorney General.
JOSEPH M. HOWARD,
RICHARD B. BUHRMAN,
Attorneys.

JANUARY 1968.

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[2] *United States* v. *Schoenburg*, 19 A.F.T.R. 2d 348 (D. Ariz.); *United States* v. *Kingry*, 19 A.F.T.R. 2d 762 (N.D. Fla.), and *United States* v. *Turzynski*, 268 F. Supp. 847 (N.D. Ill.), on which petitioner relies (Pet. 6–7), have been discredited by appellate decisions in their respective circuits. The weight of district court opinions agrees with the views expressed in the courts of appeals: See *United States* v. *Gleason*, 265 F. Supp. 880 (S.D. N.Y.); *United States* v. *Fiore*, 258 F. Supp. 435, 440 (W.D. Pa.); *United States* v. *Hill*, 260 F. Supp. 139 (S.D. Cal.); *United States* v. *Carlson*, 260 F. Supp. 423 (E.D. N.Y.); *Moon* v. *Brennan* (E.D. Wis.), decided November 21, 1966, 19 A.F.T.R. 2d 641; *Stern* v. *Robinson*, 262 F. Supp. 13 (W.D. Tenn.); *United States* v. *Bachman*, 267 F. Supp. 593 (W.D. Pa.); *United States* v. *Neves*, 269 F. Supp. 158 (S.D. N.Y.); *United States* v. *Basil*, 268 F. Supp. 1018 (S.D. Fla.); *United States* v. *Bohrod* (W.D. Wis.), decided December 14, 1965, 67-2 USTC, par. 9622.

U.S. GOVERNMENT PRINTING OFFICE: 1968